

CAUSE NO. PD-0314-18

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS
AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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JEREMY JAY CUEVAS,
Appellant

V.

THE STATE OF TEXAS,
Appellee

**APPEAL FROM THE 156th DISTRICT COURT OF BEE COUNTY,
TEXAS, IN TRIAL CAUSE NO. B-16-2003-0-CR-B**

APPELLANT'S BRIEF IN RESPONSE

TRAVIS BERRY

**Texas Bar No. 24059194
P.O. Box 6333
Corpus Christi, Texas 78466
Telephone: (361) 673-5611
Facsimile: (361) 442-2562
travisberrylaw@gmail.com**

ATTORNEY FOR APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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SUMMARY OF ARGUMENT

The Court of Appeals, upon the record presented, properly reformed the judgement to misdemeanor assault. The State could not meet it's burden to show that Bagwell was discharging official peace officer duties as Bagwell testified he never acted on any of the law violations he witnessed nor did he effectuate an arrest upon the person who assaulted him.

ARGUMENT

Reply Point: The Thirteenth Court of Appeals properly concluded that there was insufficient evidence that Bagwell was discharging an official duty at the time of the assault.

A. Lawful Discharge of Official Duty

Assault of a public servant, as alleged in this case, requires proof of misdemeanor assault plus proof of four additional elements: 1) the person assaulted was a public servant; 2) the actor knew that the person he assaulted was a public servant; 3) the person assaulted was discharging official duties at the time of the assault; 4) the person assaulted was lawfully discharging official duties. TEX. PEN.CODE § 22.01(b)(1).

Section 22.01(b)(1) provides two statutorily distinct ways of committing felony assault on a public servant, assault while the public servant is performing an official duty or assault in retaliation for the performance of an official duty. *Hall v. State*, 158 S.W.3d 470, n.8 (Tex.Crim.App. 2005); TEX. PEN.CODE § 22.01(b)(1).

On what constitutes a “lawful discharge of official duty”, the State has cited

a number of cases.¹ The State believes *Monroe* and *Thompson* are the cases in this group which are factually relevant to this case and support its position on review. (State's brief p.6)²

1. *Monroe v. State*, 465 S.W.2d 757 (Tex. Crim. App. 1971)

Monroe is a two defendant case (husband and wife) which Appellant argues is not analogous to this case. One of the defendants (husband) got quite intoxicated at a nightclub. The off-duty police officer/victim worked for the nightclub. After asking the male defendant to leave the nightclub, this defendant drunkenly ran into other patrons, "the officer at this time stopped Jackie Monroe and told him he was 'too intoxicated to be let go' and took the appellant by the shoulder and told him that he was under arrest for being drunk in a public place." *Id.* at 758. Monroe's wife Sharon Monroe began hitting the officer in protest,

¹ *Moore v. State*, 562 S.W.2d 484, 486 (Tex. Crim. App. 1978) (citing *Wood v. State*, 486 S.W.2d 771, 774 (Tex. Crim. App. 1972); *Monroe v. State*, 465 S.W.2d 757, 758-59 (Tex. Crim. App. 1971); *Horn v. State*, 463 S.W.2d 14, 15 (Tex. Crim. App. 1971); *Thompson v. State*, 426 S.W.2d 242, 243 (Tex. Crim. App. 1968) *Simms v. State*, 319 S.W.2d 315, 317 (Tex. Crim. App. 1958)).

² The State cited *Horn* with *Thompson*, but *Horn* concerns proper notice in an indictment, "Appellant assigns three grounds of error, all relating to the complaint and information. It is contended...that the complaint and information did not give notice of what he was required to answer and defend." *Id.* at 14. This Court held that the indictment's language was sufficient notice, "Horn did then and there unlawfully in and upon L.D. Rhame did commit an aggravated assault; the said L.D. Rhame then and there being an officer, to-wit: Texas Highway Patrolman of said County, and then and there in the lawful discharge of the duties of said office" *Id.*

At this time the appellant Sharon Ann Monroe struck the officer knocking his arm from the shoulder of her husband. The officer at this time warned her and reached for Jackie Monroe and again the woman struck the officer. Then Jackie Monroe backed away and began hitting the officer with his fist. At the same time, Sharon Monroe started kicking and hitting the officer with her purse and screaming and shouting and cursing.” *Id.* at 758.

A lawful arrest of Monroe for the crime of public intoxication had started, or was being effectuated, when the Monroes assaulted the arresting officer. *Monroe* was properly decided in favor of the jury’s verdict of assault on a peace officer because the officer in *Monroe* was in the process of discharging an official duty (arrest for public intoxication) when the assault occurred.

Here, appellant Cuevas was arrested by Officer Ryan Trevino and a Sergeant Behr. (RR3-152,153) Both officers were on-duty Bee County Sheriff’s officers called out to the scene after the assaultive act on Bagwell occurred. Bagwell was the victim/witness in the arrest by Officer Trevino. Officer Trevino testified, “[Clifton Bagwell] told me that he (Appellant) was the one that jumped on him.” (RR3-143)

Bagwell never attempted to effectuate an arrest for anything, public intoxication, TABC violations, etc...rather Bagwell had only asked Cuevas to return to the dance hall with his open container. (RR3-31,32,33) Bagwell never took law enforcement action alike the officer in *Monroe*.

2. *Thompson v. State*, 426 S.W.2d 242 (Tex. Crim. App. 1968)

In *Thompson*, a Detective Wood of the Houston Police Department acted as a security officer at the apartment complex where he lived. *Id.* at 243. The detective was called and was,

“instructed to go to Apartment 126 to quiet some people who were making excessive noise therein. He stated that as he approached the apartment he heard singing, music and loud voices, and that he knocked on the door, was admitted and asked who had the apartment in question under rent. One man identified himself as the occupant, and Wood identified himself as a City of Houston Detective and instructed him to break up the party. According to his testimony, one of the appellants asked to see his credentials and then passed them to the other appellants, who inspected the same before returning the identification folder with his picture to him. It was after this that each of the appellants struck him, forcing him down a flight of stairs and causing bruises upon his body. A police wagon arrived, and the appellants were carried to jail.” *Id.*

The issue on appeal was a factual debate. The defendant testified that Detective Wood did not show his detective’s badge/ID, rather a mere “security officer” card. *Id.* at 244. Detective Wood testified that he did display his Houston police identification before being assaulted. This Court held that the jury had the right to choose to believe Wood’s testimony and the right to disbelieve the defendant’s testimony. *Id.* at 243, 244

Here, Detective Wood was acting in his official capacity when he displayed his officer’s credentials while investigating this noise disturbance. This never

occurred when Bagwell asked Appellant Cuevas to return to the dance hall, or when he barred Cuevas's re-entry to the dance hall. The only official police action here was taken by Officer Trevino and Sergeant Behr who arrived on the scene. (RR3-152,153) This begets the fact that someone at the dance hall called for peace officer assistance, possibly the Bagwell's (co-workers of the arresting officers) or another patron/witness.

3. Selvage and Hafdahl

The State has also cited *Selvage v. State*, 680 S.W.2d 17 (Tex.Crim.App. 1984), and *Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex.Crim.App.1990), to support its position that Bagwell was on-duty, or discharging official peace officer duties. Appellant disagrees that these cases are factually relevant to this case and disagrees that these cases supports the State's position on review.

In *Selvage*, an off-duty Harris County deputy sheriff was shopping in a jewelry store on personal business. The owner of the store saw some suspicious characters and told the deputy that he was nervous about these persons. *Id.* at 19. The deputy agreed to help and, "in an effort to ensure that the three would cause no trouble, removed his coat and approached the counter in order to display his Deputy Sheriff's badge and his service pistol. [Deputy] Garza then escorted appellant to another section of the display counter in order to wait on him." *Id.*

Garza was subsequently shot by one of these persons. This Court held that, at that time, Garza assumed the role of a peace officer,

“the evidence showed that Deputy Sheriff Garza, at the time he was killed, was wearing both his badge and his service pistol. As stated previously, when Garza approached appellant and Kelly, he removed his coat in order to prominently display these items. Exhibit photographs show that Garza's badge was on his belt and plainly visible. One eyewitness testified that as Garza approached appellant ‘he made a big thing of saying let me help them and taking his coat off so his gun and badge was visible.’ We find the evidence ample; the jury could reasonably have concluded that appellant was aware of Garza’s status as a peace officer.” *Id.* at 21.

As to the lawful discharge of official duties,

“While it is true that Garza initially entered Ventura’s (jeweler) for personal business, when Ventura expressed his anxiety about appellant and Kelly, Garza assumed the role of a peace officer when he removed his coat to identify himself as a Deputy Sheriff and approached appellant in an attempt to deter him from wrongdoing. The evidence is sufficient to lead a reasonable jury to conclude that Garza was in the lawful discharge of an official duty.” *Id.* at 21.

Clearly, Bagwell’s actions for the dance hall customers fell far short of what steps Officer Garza took to discharge official peace officer duties in defense of this jewelry store and the faux customers who shot Garza.

In *Hafdahl*, an Amarillo police officer was on his way home after his shift ended. Hafdahl cut in front of the officer in a reckless manner, lost control of his vehicle, and wrecked. At the scene of the wreck, the officer told Hafdahl that he

was an officer and also told him to halt. The Texas Court of Criminal Appeals held that, at that point, the officer was no longer off-duty.

Although Bagwell had numerous opportunities to change his role from paid security guard to peace officer and make an arrest of Cuevas, he never took this affirmative step and opted to have the bride's father intervene and keep the peace.

4. Polk v. State, 337 S.W.3d 286 (Tex.App.-Eastland 2005)

Polk is a 2005 case that cites *Monroe*, *Thompson*, *Selvage* and *Hafdahl* to determine whether the defendant (Polk) was guilty of assault on an off-duty officer (Fobbs) who tried to effectuate a narcotics arrest after witnessing an illegal narcotics transaction. Fobbs was,

“an Arlington police officer, was working as an off-duty security guard at a Whataburger restaurant...He testified that, at sometime around 3:20 a.m., he saw two vehicles enter the parking lot...one was a Honda and the other was a Nissan. The driver of the Honda got into the passenger seat of the Nissan. Fobb...noticed that the two men in the Nissan were looking at each other and then looking down. He could see the passenger reach toward the center of the car and place something in his lap. He had seen the same things in connection with narcotics activity at this Whataburger, and he believed that a narcotics transaction was taking place in the Nissan. The night manager of the Whataburger testified that Officer Fobbs was wearing his police uniform, badge, and sidearm. Officer Fobbs said that he opened the passenger door of the Nissan and told everyone to ‘Freeze, nobody move, police.’ When he gave that order, the passenger in the Nissan threw whatever items were in his lap onto the floor...put the car in reverse, stepped on the gas, and quickly left the Whataburger...Officer Fobbs was struck by the passenger door and was knocked to the ground.” *Id.* at 287.

The Eastland Court of Appeals, finding Officer Fobbs actions were akin to the official peace officer actions employed by the off-duty officers in *Monroe*, *Thompson*, *Selvage*, and *Hafdahl*, correctly found that the above set of facts proved that, “the evidence is legally sufficient to prove that, when Polk committed the assault, Officer Fobbs was a public servant lawfully discharging an official duty.” *Id.* at 288. The lower court employed the same legal sufficiency analysis to find for Appellant Cuevas in this case.

B. Bagwell never enforced TABC provisions or any other Texas law

The State has quoted *Moore v. State*, 562 S.W.2d 484, 486 (Tex. Crim. App. 1978)³, to argue that, “an officer is for many purposes on duty 24 hours a day.” *Id.* This may be true, but Bagwell was not acting under such duty as were the officers in *Monroe*, *Thompson*, *Moore*, *Selvage*, *Hafdahl*, et al.

Here, Bagwell never attempted to begin or effectuate an arrest on Appellant Cuevas for a violation of Section 28.10 of the Alcoholic and Beverage Code or for any other Texas law. Rather Bagwell informed Cuevas of the law (and house rule

³ *Moore* is a case concerning a motion to revoke probation and a defendant’s motion to suppress the evidence gathered for such revocation. The evidence was marijuana discovered in the defendant’s car outside an off-duty police officer’s residence. The off-duty officer was alerted to the suspicious car by a neighbor, put himself into his official role of a police officer, investigated the parked car, discovered the marijuana, and held the marijuana as evidence until another officer came and took official custody of the marijuana. *Id.* at 486.

of the dance hall)⁴ and asked him to comply with the law. Bagwell testified,

State: Now, were you made aware of a patron who had left the building with an open container while you were there?

Bagwell: Yes. There was an employee that her name was Alma Garcia. She told me ...a person had gone outside with a beer in his hand, and she came and told me about it. I went over to the door that he went out of and confronted him and advised him that it was illegal to take the drinks outside and you had to take it back inside.

State: And this individual when you approached him, did he have an open beer can in his hand?

Bagwell: Yes. He had one in -- went outside and took a drink out of it, and I did recognize him as because of his dress. He was one of the wedding party.

State: In your opinion, was he intoxicated?

Bagwell: Yes.

State: Okay. Did you ask him -- what did you actually ask him to do?

Bagwell: I informed him that we didn't allow beer or liquor to be taken outside and need to be taken back inside because it's against the law.

State: What was his response?

Bagwell: His response was, "Fuck you. We rented this place. I can do what the fuck I want."

State: Okay. So what did you do as a result of that?

⁴ RR3-14, 27

Bagwell: I didn't want to start anything with the wedding party, and I went inside and talked to the bride's father... Mr. Garcia, and asked him if he could go talk to him and that way we could take care of the problem without any other trouble.

State: And what did Mr. Garcia do?

Bagwell: Mr. Garcia went over and talked to him and he came back inside, and Mr. Garcia came back and told me that he had talked to him and it was taken care of.

State: Okay. Now, did you see this individual violate any other rules while you were inside?

Bagwell: As far as the house rules, yes. Several times he went on the dance floor with beer, open containers...I informed him at that time that the house did not allow open containers on the dance floor and if he wouldn't mind, take the beer off the dance floor.

State: What was his response?

Bagwell: First time his response again, too, was "Fuck you, man. I rented this fucking place. I can do what" (RR3-28,29,30)

The State's brief correctly states, "Alcoholic and Beverage Code Section 101.07, without exception, required Bagwell, as a peace officer, to enforce Alcoholic and Beverage Code Section 28.10." Very true, except, Bagwell specifically chose not to enforce this law and just spoke with his employer that evening - Mr. Garcia - the bride's father and the person paying for Bagwell's security services.

The State went on to propose that, “had Bagwell failed or refused to enforce Section 28.10, both Bagwell and the Grand would have been subject to criminal liability. See TEX. ALCO. BEV. CODE §§ 1.05, 101.61.” Bagwell did not seem overly concerned with these TABC laws this evening. After witnessing Texas Penal Code violations, TABC violations, after explaining these law violations to Appellant Cuevas, and then being vulgarly cursed at, Bagwell does not effectuate an arrest for anything. This is because Bagwell’s primary paid-for duty at this wedding party was clear, “I didn’t want to start anything with the wedding party, and I went inside and talked to the bride’s father... Mr. Garcia came back and told me that he had talked to him and it was taken care of.” (RR3-30)

Bagwell, by his own testimony, was not acting in any official peace officer capacity this evening. Appellant would argue that any officer acting within his official peace officer duty - faced with a highly intoxicated subject in public, who is continuing to violate TABC open container laws, and who responds to requests to comply with such foul language - would arrest this subject; unless their primary duty was to the private entity compensating them for services. The latter option is clearly the case here.

CONCLUSION

Instead of calling his fellow Sheriff’s deputies to arrest Cuevas, or simply

arresting Cuevas himself, Bagwell took his concerns over these law violations to the bride's father, his private employer. This evidence supports the lower court's finding that Bagwell was not discharging an official duty at the time he was assaulted.

PRAYER

For the foregoing reasons, the State respectfully requests that the judgment of the Thirteenth Court of Appeals be affirmed.

Respectfully submitted,

/s/ Travis Berry

Travis Berry

Texas Bar No. 24059194

P.O. Box 6333

Corpus Christi, Texas 78466

T: (361) 673-5611; F: (361) 442-2562

travisberrylaw@gmail.com

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that on this August 30, 2018, a true and correct copy of the Appellant's Brief has been sent via e-filing to Stacey Soule, State Prosecuting Attorney, and to Bee County District Attorney Jose Aliseda, 111 S. St. Mary's Street, Ste. 203, Beeville, Texas 78102.

/s/ Travis Berry
Travis Berry

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Wordperfect's word-count tool this document contains **2,980** words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Travis Berry
Travis Berry